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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE.

Plaintiff and Respondent,

v.

CARLOS ALVAREZ,

Defendant and Appellant.

F041776

(Super. Ct. No. 02-90608)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. William Silveira, Jr., Judge.

Andrew Cappelli, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Buckley, J., and Wiseman, J.

BACKGROUND

Appellant, Carlos Alvarez, was charged by information with three counts relating to an incident occurring on April 17, 2002. It was charged in count 1 that appellant inflicted corporal injury upon his cohabitant in violation of Penal Code section 273.5, subdivision (e).[1] In count 2, he was charged with assault with a deadly weapon in violation of section 245, subdivision (a)(1) and in count 3 with making a terrorist threat[2] on the same date.

At trial, the jury was instructed, inter alia, that simple assault was a lesser included offense of both counts 1 and 2. After all instructions were read, the jury retired to deliberate. After the jury notified the court they had reached a verdict, they were brought into court:

> "THE COURT: Has the jury reached a verdict?
>
> "JURY FOREPERSON: Yes, sir.
>
> "THE COURT: Please give the verdict forms to my bailiff so that I may look at them. [¶] …
>
> "JURY FOREPERSON: Yes, sir.
>
> "THE COURT: In view of the jury's verdict on count two, I have to have you make some -- I have to have the jury make some decision on the lesser included offense of simple assault. So you have to decide, having found the verdict that you did on that count, you have to decide whether he may or may not be guilty of simple assault as I define it for you.
>
> "You can go back in the jury room. I'll have my bailiff give you that. Take a vote on it.
>
> "(Recess taken.)

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1 Statutory references are to the Penal Code unless otherwise noted.

2 At some point, unclear from the record when, count 3 was dismissed.

"THE COURT: (Jury Foreperson), has the jury reached a verdict on the lesser included offense?

"JURY FOREPERSON: Yes, sir.

"THE COURT: Give it to my bailiff please. The clerk will please read the verdicts.

"THE CLERK: In the Superior Court of the State of California, in and for the County of Tulare. People of the State of California versus Carlos Alvarez. Case number 02-90608.

"Count one: We, the Jury, find the defendant guilty as charged in count one of the information of corporal injury, cohabitant with a prior conviction, victim, RV, in violation of Penal Code section 273.5.…

"Special allegation to count one: We, the Jury, further find to be true the special allegation that pursuant to that the defendant has within the past seven years suffered the following prior conviction: Court case 01CM7314, code 273.5/17(b) P.C.; conviction date, 7-13-02; County, Kings County; State of California, Superior Court. [¶] …

"Count two: We, the Jury, find the defendant not guilty as charged in count two of the information of assault with a deadly weapon by -- and by force likely to produce great bodily injury, to wit, crowbar; victim, RV; in violation of Penal Code section 245(a)(1). [¶] …

"*Count one*: We, the Jury, find the defendant guilty of the lesser offense of assault, victim RV, in violation of Penal Code section 240." (Italics added.)

DISCUSSION

Appellant contends that the convictions for spousal abuse and simple assault must be reversed as it is unclear whether the jury meant to convict on count 1, spousal abuse and on simple assault as a lesser offense of *count 2*, as construed by the trial judge. We disagree.

In order to convict a defendant, the jury need not formalize its verdict in writing, but its intent to convict must be unmistakable. (*People v. Keltie* (1983) 148 Cal.App.3d 773, 784.) Therefore, the fact that the jury signed the verdict form of the lesser offense relating to count 1, rather than count 2, is not controlling so long as it is clear the jury

meant to sign the lesser offense verdict on count 2. A jury's obvious intent is what must be recognized. (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 514.)

We must then look at the circumstances to determine what the jury's intent was. We conclude it is abundantly clear from the record that the jury meant to sign the lesser offense relative to count 2.

First of all, the parties and the judge treated it as such. No objection was made either at the reading of the verdict or at sentencing when specific reference was made to sentence under count 2. Second, when the verdicts were first returned, the court looked at them and then ordered them back to make a decision on the lesser offense of simple assault "[i]n view of the jury's verdict on count two." The court added, "So you have to decide … whether he may or may not be guilty of simple assault …."

From these remarks, it is clear that the verdict on count 1 had been signed and the only unfinished business related to count 2. It would be patently unreasonable to assume that the court received two signed verdicts, the lesser and the greater on count 1, instructed the jury regarding the count 2 lesser offense and subsequently the jury came back without signing any other verdict form (in other words, contrary to instruction, they did nothing).[3]

In conclusion, it is unmistakably clear that the jury signed the wrong verdict form and that they intended to find appellant guilty of count 1 as charged and the lesser offense of count 2. (*People v. Keltie, supra*, 148 Cal.App.3d at p. 784.)[4]

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[3] That the jury, when asked if these were their verdicts answered in unison that they were, does not detract from this conclusion. It is not likely the jurors would have focused on the particular count during the reading of the signed verdicts.

[4] Notwithstanding this conclusion, the lesser offense of simple assault must be stricken as appellant asserts, and respondent agrees, that under the circumstances here, simple assault was a necessarily included lesser offense of corporal injury on a

DISPOSITION

The judgment is modified to vacate the conviction and sentence of simple assault relating to count 2. The trial court is directed to prepare a new abstract of judgment consistent with this modification. As so modified, the judgment is affirmed.

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cohabitant. Therefore, it cannot stand. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) We agree.